SUPREME COURT, U.S.
Office - Supreme Court, U.S.
FILED
SEP 19 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 440

MORTON SOBELL,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed an order of the United States District Court for the Southern District of New York denying a motion for a hearing pursuant to Title 28, U. S. C., Section 2255.*

Opinions Below

The opinion of the district court denying petitioner's two motions for hearings pursuant to Title 28, U. S. C.,

* The courts below concurrently considered and denied a second motion pursuant to Title 28, U. S. C., Section 2255, for a hearing and, upon the hearing, for an order vacating and setting aside the sentence and judgment of conviction on the ground that violations of the treaty of extradition between the United States and Mexico deprived the former and its domestic courts of national jurisdiction to try petitioner and impose sentence. This motion is the subject of a companion petition for writ of certiorari filed herewith.

Section 2255 is reported at 142 F. Supp. 515 and appears in the record at A. 197.*

The opinion of the court below is reported at 244 F. 2d 520, and is attached hereto as Appendix II.

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1957 (Appendix I). A petition for rehearing was denied on June 3, 1957. On August 28, 1957, the time for filing petitions for writ of certiorari herein was extended to and including September 10, 1957, by order of Mr. Justice Harlan. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254 (1).

Questions Presented

Petitioner moved for a hearing pursuant to Title 28, U. S. C., Section 2255, charging that his conviction had been fraudulently contrived in that the prosecution knowingly, wilfully and intentionally used false evidence and perjured testimony to establish that petitioner had been deported or otherwise ousted by the Government of Mexico, when, in truth and fact, it was the prosecution, acting through its agents in the United States and Mexico, who had kidnapped petitioner from that country without the knowledge or con-

* We designate with the letter "A" references to the current record on appeal. The printed record of the original trial is referred to as "R". Attached to this petition are five appendices, designated by Roman numerals, containing respectively the judgment of the court below, the opinion, the papers on the motion to amend the record on appeal, petitioner's affidavit in support of the motion in arrest of judgment, and excerpts from the prosecution's brief in the original appeal to the Court of Appeals. In addition, photostatic copies of the Exhibits and Appendices A to D attached to the motion have been filed with the Court.

sent of any Mexican governmental authority. To shield this fraud from judicial scrutiny, the prosecution not only suppressed the facts which would have refuted the false evidence and exposed its role in petitioner's seizure, but also made false representations to both the trial and appellate courts.

Respondent has not denied the facts set forth in the moving papers, but relies upon the files and records of the case. Petitioner's motion was denied without a hearing.

The questions presented are:

1. Whether, upon the files and records of this case and the moving papers, petitioner's motion should have been denied without a hearing.

2. Whether the lower court denied due process to petitioner in disregard of Section 2255 and the rules governing habeas corpus proceedings by rejecting, without a hearing, the allegations of the petition and concluding that the Mexican Government had deported and was responsible for petitioner's removal from that country.

3. Whether the lower court should have granted petitioner's motion to amend the record to include, or remanded the case for the district court to consider a certificate of the Secretariat of *Gobernacion* of the Government of Mexico, received after argument of the appeal but prior to decision, attesting to the absence of any expulsion or deportation order against petitioner.

4. Whether petitioner's motion in arrest of judgment, challenging the trial court's jurisdiction over his person and requesting a hearing to obtain facts relating to his seizure in Mexico, is a bar to a motion pursuant to Section 2255, upon evidence subsequently acquired, charging that the prosecution had fraudulently contrived his conviction by the knowing use of false evidence relating to petitioner's removal from Mexico.

5. Whether, under the circumsta..ces of this case, petitioner has waived the right collaterally to attack his conviction on the grornd that the prosecution knowingly, wilfully and intentionally used such false evidence and perjured testimony.

Statute Involved

Title 28, U. S. C., Section 2255 provides:

§ 2255. *Federal custody: remedies on motion attacking sentence.*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

Statement of the Case

A. Summary of the Proceedings

On January 31, 1951, an indictment was returned against petitioner charging in a single count that he had conspired to transmit to the Union of Soviet Socialist Republics "documents, writings, sketches, notes and information relating to the national defense of the United States" in violation of Title 50, U. S. C., Section 34 (R. 2).

Petitioner was tried and convicted together with co-defendants Julius and Ethel Rosenberg. On April 5, 1951, a sentence of thirty years was imposed upon petitioner (R. 30). On February 25, 1952, the Court of Appeals affirmed the judgment of conviction, Judge Frank dissenting. 195 F. 2d 583.*

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* 195 F. 2d at 601: "The writer of this opinion disagrees. He thinks that there was error, in this respect, which requires that Sobell be given a new trial. The balance of this paragraph sets out the writer's reasons for dissenting on this issue. Even if Sobell, on Elitcher's testimony, could reasonably be held as a member of the Rosenberg-Gold-Greenglass conspiracy, the question of his membership should have been submitted to the jury. Elitcher's testimony would have supported either of two inferences, i.e., that Sobell agreed only (1) to transmit certain kinds of military information to Russia or (2) that he agreed with the other conspirators to transmit 'any military information of all kinds.' The jury should have had the opportunity to choose between the inferences and to decide whether he actually joined the larger conspiracy."

A petition for writ of certiorari to this Court was denied on October 13, 1952, Mr. Justice Black noting his opinion that the petition should have been granted. 344 U. S. 838. On November 17, 1952, a petition for rehearing was denied, Mr. Justice Black adhering to his view that the petition for certiorari should have been granted. 344 U. S. 889; see also memorandum filed by Mr. Justice Frankfurter in the petition for rehearing in the companion case of *Rosenberg* v. *United States*, 344 U. S. 889. Accordingly, this Court never reviewed the record and never affirmed the fairness of petitioner's trial below. 346 U. S. 273, 301.

Petitioner is presently detained in the United States Penitentiary at Alcatraz, California, and has been in federal custody since August, 1950.

On May 8, 1956, the petitioner, pursuant to Title 28, U. S. C., Section 2255, moved for a hearing and, upon the hearing, for an order vacating and setting aside the sentence and judgment of conviction on the grounds that his conviction was unjustly and illegally procured in violation of the Constitution and laws of the United States. In this motion, petitioner charged that his conviction was fraudulently contrived in that the prosecution knowingly, wilfully and intentionally utilized false evidence and perjured testimony, deliberately suppressed evidence which would have exposed its fraud, and made false representations to the trial and appellate courts in an effort to conceal the original fraud (A. 7).

The Government failed to controvert any of the allegations of fact contained in the motion. Over petitioner's opposition, both this and the companion motion were referred to Judge Irving R. Kaufman, who presided at the original trial. After oral argument on June 4, 1956 (A. 111), the district court denied both motions without a hearing. On April 26, 1957, the Court of Appeals denied a motion of petitioner to amend the record on appeal to in-

clude an official statement by the Secretariat of *Gobernacion* of the Government of Mexico, received by counsel for petitioner subsequent to the argument before the Court of Appeals but prior to decision (Appendix III, *infra*). On May 14, 1957, the Court of Appeals for the Second Circuit in an opinion by Circuit Judge Medina affirmed the order of the district court denying the two motions for hearings.

B. The Facts and Issues Involved in the Original Trial and Appeal

The trial. Only one witness, Max Elitcher, attempted to associate petitioner with the alleged conspiracy. He was an admitted perjurer (R. 278-282, 369) and a claimed co-conspirator who was testifying with dubious intent and motive. The remainder of the case against petitioner was limited to an attempt to establish his guilty consciousness by proving he had fled to Mexico, with no intention of returning to the United States (A. 16).

The prosecution sought to show that petitioner, acting in accordance with a preconceived plan of the conspiracy, fled from the United States to Mexico to avoid apprehension by the federal authorities. To establish that petitioner's trip to Mexico was for the purpose of flight and to avoid prosecution, the Government attempted to prove that he was returned against his will by the Government of Mexico and handed over to the United States authorities (A. 13-19). To this end, the prosecution offered evidence to prove that petitioner was legally deported by the Government of Mexico (A. 11-13). This evidence of deportation as the district court pointed out, was the "natural capstone" of the flight evidence (A. 218).

The prosecution sought to prove petitioner's deportation by the Government of Mexico through two witnesses and Government Exhibits 25 and 25-A.

In the course of his direct examination of the witness Manuel Giner de los Rios (a neighbor of petitioner in Mex-

ico City), Roy Cohn, the assistant prosecutor, asked "what date Sobell was deported to the United States by the authorities" (R. 926). Defense counsel objected on the ground that the witness was not qualified to establish action by the Mexican authorities. Mr. Cohn replied, "Of course, your Honor, I am asking a question. I think we have other proof coming." In reply to the court's question, "You have other proof coming of deportation?", Mr. Cohn answered affirmatively (R. 926).

Shortly thereafter, Mr. Cohn tendered Government Exhibit 25, purportedly a true copy of a manifest made in the regular course of business by the Laredo, Texas, office of the Immigration and Naturalization Service, which contained on its face a notation that petitioner had been "Deported from Mexico" (R. 1031). Mr. Cohn tendered this exhibit as proof of "the circumstances of the departure of Sobell from Mexico to the United States" (R. 938).

Defense counsel objected to the document on the ground that an entry made by an employee of the United States did not constitute competent proof of governmental action by a foreign power (R. 940). The court directed, over Mr. Cohn's objection, that he produce the maker of the document to authenticate it.

The following day, March 21, 1951, James S. Huggins, immigration inspector of the Immigration and Naturalization Service of the Department of Justice, was produced, after being flown from his station in Laredo, Texas. Mr. Huggins' direct testimony consisted solely of the facts that he had prepared Government Exhibit 25-A in the regular course of his duties as a Government employee (R. 1025), and that petitioner was brought into his office by Mexican Security Police (R. 1030). The prosecution studiously avoided asking him anything concerning the circumstances of petitioner's removal, but merely used his testimony to authenticate the document.

On *voir dire* and cross-examination, Huggins stated:

1. The notation "Deported from Mexico" was based on his own information and observation (R. 1027, 1028) and was not supplied by the persons who delivered petitioner to Laredo, Texas (R. 1028, 1036).

2. Petitioner was delivered to him by officials from Mexico acting in their "official capacity" (R. 1026).

3. He had been awaiting petitioner's arrival (R. 1034-1035).

4. He advised petitioner that the manifest must be signed because "our regulations require that any person who is being deported from Mexico there be a record made • • • " (R. 1036).

The trial court in the charge characterized the evidence as proof that petitioner would not have returned except for the action of the Mexican government. He stated that the jury could consider petitioner's trip to Mexico and his return by the Mexican authorities as proof of (1) guilty flight and (2) independent proof of petitioner's membership in the Rosenberg-Greenglass conspiracy, charging:

> " • • • The prosecution says that when the conspiracy was uncovered • • • the defendants, fearful of being apprehended, attempted to flee and that their attempts to flee followed a pattern which also indicates a preconceived plan • • • *and that he [petitioner] was apprehended only after being delivered to the United States by the Mexican authorities.* • • • "You may consider whether such journeys or trips show a preconceived plan as part of the conspiracy • • • " (R. 1559-1560; emphasis supplied).

The motion in arrest of judgment. On the day of sentencing, petitioner submitted an affidavit in support of a

motion in arrest of judgment challenging the jurisdiction of the court over his person (R. 31-33; attached as Appendix IV hereto). Petitioner's affidavit confined itself to a physical description of his seizure on August 16, 1950, and transportation to Laredo, Texas. He stated that he was seized at his residence in Mexico City by persons claiming to be police, on the pretext that he was wanted for robbing a bank in Acapulco. His personal effects, including his "visa", were taken from him. He was denied an opportunity to communicate with the United States Embassy, assaulted and rendered unconscious, and removed to a building where he was held from approximately 8 o'clock in the evening until 4 o'clock the next morning. At that time he and his family were placed in cars under guard and transported to Nuevo Laredo. Upon approaching the International Bridge, a United States agent entered the car and brought petitioner to Laredo, Texas, where he was directed to sign a card and was subsequently placed in custody.

Petitioner, lacking essential information about the circumstances of his removal, requested that a hearing be held to determine whether it had been lawful (R. 1598).

The prosecutor, Irving Saypol, argued that the affidavit was false and should be disregarded (R. 1598-1599):

> "This very affidavit contains a falsehood in the statement that there was exhibited amongst other things to the Mexican authorities visas. Counsel ought to know that his client never went into Mexico with a visa. * * * It is evident in the fact that throughout this trial there sat in this courtroom the wife of the defendant as to whom the affidavit states that she was present and we knew that she was present from the time of the arrest until the time the *final act of deportation was effected at Laredo* * * *.
>
> "The Court: I think I have enough.

"Mr. Saypol: The whole affidavit portrays certainly that this defendant was not honorably escorted from Mexico but that *literally he was kicked out as a deportee.*" (Emphasis supplied.)

The trial court summarily denied without opinion petitioner's motion in arrest of judgment.

The original appeal. On the appeal from the original judgment of conviction petitioner urged the Court of Appeals to reverse the conviction on the grounds, *inter alia,* that (1) the testimony of deportation from Mexico and Government Exhibit 25-A were irrelevant, immaterial and incompetent; and (2) it was error for the lower court to deny petitioner a hearing on his motion challenging the jurisdiction of the trial court over his person.

The prosecution in its brief to that court urged the relevancy and materiality of the deportation evidence.* The prosecution further argued that the evidence established that petitioner had been legally deported by the Government of Mexico. It declared that there was no evidence of illegality in petitioner's removal nor unlawful instigation or participation on the part of the prosecution or its agents.**

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* "Thus, proof that his return was involuntary, in conjunction with proof of his activities in Mexico, tended strongly to show that his trip to Mexico was prompted by a desire to escape prosecution. As such it was persuasive evidence of his consciousness of guilt." (Government's Brief, p. 66).

** The pertinent sections of the prosecution's brief are set forth in Appendix V, *infra.* The prosecution stated in part (Appendix V, pages 29a-31a):

"While kidnapping may be a criminal offense in Mexico, summary deportation of a fugitive from justice is hardly tantamount to kidnapping. [Footnote:] Even if it is true, as Sobell alleges,

In affirming petitioner's conviction, the Court of Appeals, relying upon the record below and the representations of the prosecution, held that the evidence of deportation was highly relevant and established that petitioner was legally deported by the Government of Mexico.*

The original petition for writ of certiorari. In response to the original petition for writ of certiorari to this Court, the prosecution, in a more guarded but equally

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that he was beaten by the Mexican police, such mistreatment would hardly invalidate his deportation."

* * *

"Surely, a fugitive from justice who is willingly surrendered by the country of his asylum to the country where he is wanted derives no immunity from prosecution by reason of the latter's request for his surrender."

* * *

"There is not a shred of evidence that any United States agent assisted the Mexicans in this act. Nor is there anything in the record to indicate that the United States Government procured the Mexican Government to deport Sobell. The most that appears is that the FBI was waiting for Sobell in Laredo when he was delivered by Mexico into the hands of the United States Immigration Service. From this it may be inferred that the Mexican authorities had alerted the FBI to expect Sobell's arrival, but it by no means follows that the Bureau was the instigator of Sobell's ouster."

* * *

"For even if the rule were as Sobell would like it, he would not be in a position to invoke it, since it presupposes wrongful conduct on the part of a federal officer, and there is not a scintilla of evidence of any such conduct here."

* Thus the Court of Appeals stated in its opinion (195 F. 2d at 603):

"* * * the Government introduced evidence to show that Sobell had been legally deported from Mexico * * *."

and further (at 603, footnote 20):

"It seems particularly inconsistent, therefore, for Sobell not to have introduced evidence, during the trial, of his kidnapping to contradict the Government's evidence of legal deportation."

insistent fashion, continued to vouch for the evidence of deportation by the Mexican Government. It argued to this Court that the evidence of deportation was competent and that the "inspector who made the entry testified that he was under a duty to do so in the case of every deportee from Mexico (R. 1027, 1036)".* More than this the prosecution maintained its position that petitioner's removal was to be attributed solely to the Mexican Government.**

C. The Facts and Issues Involved in the Present Motion

The main allegations of the motion which establish the tainted character of the conviction are based on facts only recently obtained by petitioner and therefore not included in the affidavit submitted in support of the motion in arrest of judgment. These are the allegations which demonstrate for the first time that petitioner was not deported or expelled by the Government of Mexico.† Petitioner's factual

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* Government's opposition to petition for writ of certiorari at page 51:

"The inspector who made the entry testified that he was under a duty to do so in the case of every deportee from Mexico (R. 1027, 1036), and that he made the entry in the regular course of his duties on the basis of personal observation, as was his custom in cases of similar character (R. 1027). Thus, the trial court correctly admitted the entry under the business entry statute. 28 U. S. C. 1732."

** Government's opposition to petition for writ of certiorari at page 42:

"It is clear also that even if Mexico summarily expelled Sobell, it has not been shown that its action was unlawful. Consequently, even if the United States requested such expulsion, he cannot complain."

† This newly obtained evidence is the result of field investigations in Mexico by American and Mexican counsel which took more than a year to complete.

allegations are undenied. For the purpose of determining whether a hearing should have been granted, the facts alleged in the motion will be deemed to be true. *Chessman* v. *Teets*, 350 U. S. 3, 4.

Petitioner's charge that his conviction was fraudulently contrived is grounded upon a fundamental, uncontroverted fact. He was not deported or expelled by the Government of Mexico. He was abducted by agents of the prosecution and Government of the United States without the knowledge, participation or consent of the Mexican governmental authorities.

The motion does not rest upon this direct assertion or conclusion alone. It contains the most detailed factual allegations in support of its ultimate conclusion.*

Thus, the motion incorporates a statement from the Nuevo Laredo office of the Department of Immigration of the Secretariat of *Gobernacion*, denying petitioner's deportation through that city (Exs. 12, 13). Further, following the argument in the Court of Appeals, petitioner submitted an official statement from the Mexican Government establishing that it had nothing to do with his removal. The statement was issued by the Secretariat of *Gobernacion* of the Government of Mexico, the department solely responsible in this area and whose files would reflect any removal of an alien by deportation expulsion or otherwise. This department authoritatively stated that "in the files pertaining to Morton Sobell, United States citizen, there is no record to the effect that this department has ordered his expulsion from the country" (Appendix III, p. 18a). Petitioner moved to amend the record to include this document, but the court below without opinion or comment de-

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* We are confident that this Court will recognize that the allegations in this petition are far more specific than those in many cases in which this Court has ordered a hearing. Compare *Pyle* v. *Kansas*, 317 U. S. 213.

nied his motion. Thus, the official files and records of the Mexican Government, including the records of the Department of Immigration in Mexico City as well as the records of the port of exit, Nuevo Laredo, establish that the Government of Mexico neither deported nor expelled petitioner.

As additional proof of the lack of Mexican governmental participation in petitioner's removal, the motion pointed to its variance from the regular and established deportation procedures followed by Mexico internally and in relation to the United States (A. 25-26, 37-38).*

But petitioner did not merely set forth the total absence of any action by the Government of Mexico. He charged that the prosecution itself, through its agents in the United States and Mexico, initiated and executed his abduction. He was seized in a secret and conspiratorial fashion so as to prevent knowledge or interference by the Government of Mexico until he had been carried beyond its borders. This charge is also supported by extensive factual allegations.

Petitioner and his family left the United States for a trip to Mexico on June 22, 1950 (A. 21). Prior to departure they had obtained tourist cards from the Mexican Consulate in New York City. Travelling by air, they stopped at Dallas, Texas, where petitioner registered certain personal effects with the United States Customs officials to avoid customs duties on his planned return (A. 21, Exs. 3, 4 and 5). All this was done under his own name and not in a surreptitious manner. In going to Mexico, petitioner did not seek to avoid prosecution or apprehen-

* In setting forth these facts we do not here mean to raise the legal effect of a failure of the Mexican Government to comply with its internal law, nor is the issue that petitioner was removed without requisite formality or adjudicative process. These facts are set forth merely to establish that no Mexican authority was responsible for petitioner's removal.

sion, nor was his trip in any way related to a purported involvement in criminal activities. The authorities had not evidenced any desire to interview, let alone apprehend, him, nor was he aware of any reason why they should (A. 16).

In Mexico City petitioner rented in his own name an apartment for himself and his family. He carried on his person numerous documents accurately reflecting his identity. Petitioner planned to and would have voluntarily returned to the United States had he not been prevented from doing so by his seizure (A. 21-22, Exs. 7, 8, 9, 10, 11).*

Petitioner's seizure was conceived, directed and participated in by agents and representatives of the prosecution and of the United States Government. The Federal Bureau of Investigation, at the direction of the prosecution, used its contacts in Mexico to devise a scheme to kidnap petitioner without the knowledge of the Mexican Govern-

* There was testimony that petitioner after openly residing in Mexico a month, used aliases for a period of about ten days during which time he travelled to Vera Cruz and Tampico. In this short period he contemplated leaving for Europe or South America. The temporary desire to leave Mexico was impelled by the fact that he had learned of the arrest of Julius Rosenberg, a college classmate of his, with whom he had engaged in left-wing activities during their student days. Because of his continued social relationship with the Rosenbergs and the anti-Communist hysteria and prosecutions in the United States, he felt that he, too, might become an innocent victim of persecution. His exaggerated fears resulted in a temporary loss of good judgment. He soon recognized this, and by August 1, 1950, he had returned to Mexico City where he continued to reside openly with his family until his abduction on August 16. At that time he and his family were making plans to return to the United States.

This testimony was itself the fruit of the illegal seizure of petitioner and search of his person and premises by agents of the prosecution. Prior to petitioner's abduction, the prosecution had no knowledge of his travels in Mexico or his use of aliases. See Paragraph 9, *infra*.

ment (A. 36).* It recruited individuals in the employ of the Secret Police of the Federal District of Mexico to collaborate with American agents in seizing petitioner and bringing him to the United States (A. 27, 28, 34-36). These policemen did not participate in petitioner's seizure in behalf or with the knowledge of any Mexican authority, but solely as agents of the prosecution.**

On August 16, 1950, petitioner and his family had returned to their apartment from a picnic. As they were completing their supper, three Mexicans in civilian clothes, agents of the prosecution, who identified themselves as police officers, entered and seized petitioner. They said he was "Johnny Jones" and was wanted for robbing a bank in Acapulco. Petitioner stated that he was Morton Sobell. He fruitlessly demanded an opportunity to call the United States Embassy to prove his identity and obtain protection. The kidnappers seized the credentials he offered to establish his identity. Finally, petitioner was forcibly carried away (A. 22).

Earlier that day, American and Mexican agents of the prosecution had gone to petitioner's apartment house to discover his exact location. Neighbors were told that petitioner was wanted in the United States on a charge of kidnapping a child (A. 28-29).

Another circumstance corroborates the American inspiration and control of the abduction. Several hours after

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* The FBI has, in some instances without the consent or knowledge of the country involved, stationed its agents in various American nations and established unofficial relations with nationals (A. 36). See also Don Whitehead, *The FBI Story* (1956), pp. 210-230.

** The jurisdiction of this local police agency is, in fact, limited to the Federal District of Mexico, whose geographical boundaries are essentially those of Mexico City. They have no power to act beyond these boundaries, nor are they authorized to act in any way in immigration matters (Appendix D). They are analogous to plainclothesmen of the District of Columbia Police Department.

the kidnapping, petitioner's domestic worker, Senora De Soto, was told by one of the abductors that they were acting as agents and representatives of the United States Government (A. 29).*

The prosecution's intimate connection with the abduction is further demonstrated by the fact that within approximately two days of the kidnapping, some of petitioner's abductors returned to the house in the company of an FBI agent and interviewed Government witness Rios and his wife (A. 30). Within a period of ten days following the kidnapping, Rios was seen by the FBI on three occasions and at least in one instance was taken to the United States Embassy for interrogation.**

About a month after the kidnapping, Senor Rios was visited at his place of business in Mexico City by prosecutors Roy Cohn and Irving Saypol and an FBI agent (A. 30).***

Since the prosecution initiated, organized and participated in petitioner's abduction, it of course knew that evidence purporting to show deportation by the Government of Mexico was false and perjurious.

But beyond any mere inference from these facts, the prosecution and its witness Huggins had direct notice

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* In removing the personal effects of petitioner and his family from their apartment, the agents took this woman's belongings also. She was advised that her possessions were being held by the United States Embassy and that she should go there to obtain them (A. 29-30).

** The Mexican Government does not sanction FBI investigations on its soil (A. 36).

*** The petition points to the circumstances surrounding petitioner's delivery to the FBI at Laredo, Texas, as further proof that the prosecution directed his abduction. At every stage of the action, the movements and activities of the American and Mexican agents of the prosecution were completely coordinated (A. 31-32).

long before the trial that petitioner was not deported by the Government of Mexico.

Upon learning from United States news reports of petitioner's kidnapping, the Mexican Government instituted an investigation in Laredo and Nuevo Laredo and took certain steps to prevent a repetition of such an unlawful invasion of its national sovereignty (A. 25).

Within a day of petitioner's arrival in Laredo, Huggins and other employees of the United States Immigration Service were advised by Hector Rangel Obregon, Chancellor of the Mexican Consulate at Laredo, that petitioner had not been deported. Senor Obregon expressed concern that the seizure and removal had occurred without the knowledge or approval of the Government of Mexico (A. 27).*

This information was immediately transmitted to the prosecution. At the very time Huggins was so informed by the Mexican consulate, FBI agents John W. Lewis (who sat at the prosecutor's table throughout the trial), Rex I. Shroder and Leo H. Frutkin of the New York staff were in Laredo, Texas, in connection with the case (A. 27-28). Finally, petitioner alleged that Mexico sent a report of the abduction to its Embassy in Washington, which in turn made representations on the matter to the United States Government (A. 38). Subsequent to the filing of the motion and while the case was pending on appeal, petitioner received an official declaration from the

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* Even before this notification, Huggins, as an experienced immigration officer, must have been well aware that petitioner's removal from Mexico was not a deportation by governmental action. As the motion points out (A. 37-38), petitioner was put over the frontier at three o'clock in the morning unaccompanied by Mexican immigration officers and without any of the necessary documents furnished to all deportees prior to leaving Mexico. This was hardly the regular course of business. See Exhibit 14a-m, attached to motion.

Secretariat of *Gobernacion* of the Government of Mexico, stating that "in the files pertaining to Morton Sobell, United States citizen, there is no record to the effect that this department has ordered his expulsion from the country" (Appendix III, p. 18a).

None of these facts have been controverted. In this posture of the case, the following conclusions must be drawn:

1. The prosecution knew that petitioner was abducted from the territory of Mexico without the knowledge or consent of the Mexican Government. It was the prosecution itself which had planned, directed and participated in petitioner's abduction.

2. Long prior to the trial, the prosecution and the witness Huggins were informed by official representatives of the Government of Mexico that petitioner had not been deported and that the Mexican Government had not in any way consented to or participated in petitioner's removal.

3. Nevertheless, the prosecution fraudulently attributed its unlawful seizure to the Government of Mexico by knowingly, wilfully and intentionally utilizing a false document, Government Exhibits 25 and 25A, and the perjured testimony of Huggins, to establish that petitioner had been legally deported by the Government of Mexico.

4. In order to protect this fraud and further mislead the court, defense and jury, the prosecution suppressed evidence in its possession which would have disclosed the falsity of the evidence offered.

5. Finally, in its effort to hide the fraud and to prevent a judicial inquiry into the true facts, the prosecution made false representations to the trial and appellate courts by continuing to insist that petitioner's removal was an act of lawful deportation by the constituted authorities of the Government of Mexico.

The fraud charged by petitioner and uncontroverted by the Government was the almost inevitable result of the illegal seizure of petitioner in Mexico by agents of the United States. The weakness of its case against petitioner forced the prosecution to rely on the theory of conspiratorial flight. But the use of this evidence to that end created a dangerous dilemma. If the true facts concerning the abduction became known, it is doubtful whether, under the doctrine of *McNabb* v. *United States*, 318 U. S. 332, such evidence of "involuntary return" would have been admissible.* The other evidence purporting to show flight would likewise have been inadmissible, as the fruit of an illegal search and seizure. Moreover, petitioner's seizure by the prosecution without the consent of the Mexican Government, if known, would have raised the most serious questions of personal and national jurisdiction.**

Legal impediment was thus transformed into legal advantage. An abduction by agents of the prosecution became an act of deportation by the Mexican Government. The testimony that petitioner was "deported" by Mexico not only saved the "flight" evidence and hid the jurisdictional defects: It affirmatively implied to the jury an adjudication by Mexico of petitioner's guilt and misconduct. The difficulty faced by petitioner in obtaining facts concerning events in a foreign country and matters usually confined to diplomatic channels served to immunize the fraud from detection.

To contrive an act of legal deportation by the Mexican Government out of a lawless abduction required more than skill. It required a confidence that the emotional currents which swirled around this case at the height of the Korean War would hide the nature of the fraud from judicial scrutiny.

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* See Paragraph 9, *infra*.

** See companion petition for writ of certiorari.

Reasons for Granting the Writ

1. The decisions of the lower courts in denying petitioner's request for a hearing constitute such a departure from the almost universally accepted standards in habeas corpus and Section 2255 proceedings as to require this Court to exercise its power of supervision. These decisions not only disregard the issues and facts posed in the present motion, but they leave unchallenged conduct of our law-enforcement authorities which has important consequences for the administration of the criminal law.

Judicial evaluation of the fairness of petitioner's original trial was inextricably intertwined with the fate of his two co-defendants. The heightened emotions of that period and the case itself precluded the type of review which today, in a calmer and less troubled time, is available. Compare dissenting opinions of Justices Black, Douglas and Frankfurter in *Rosenberg* v. *United States*, 346 U. S. 273, 289, 296, 301, 310. A reconsideration of the fairness of the original trial in respect to petitioner's two co-defendants has, as Mr. Justice Frankfurter pointed out, "the appearance of pathetic futility." 346 U. S. at 310. But as the Justice also reminded us, "Perfection may not be demanded of law, but the capacity to counteract inevitable, though rare, frailties is the mark of a civilized legal mechanism." 346 U. S. at 310. To deprive this petitioner of an opportunity to prove his admittedly serious charges which, if true, would invalidate the trial, cannot be justified. Our system of law and justice must be able to rise above the turbulent passions of a partisan moment and administer justice in a spirit of "sturdy self-examination and self-criticism."

For as Lord Mansfield said in *Rex* v. *Wilkes*, 4 Burr., 2527, at 2561-2562: "The constitution does not allow reasons of state to influence our judgments: God forbid it should! We must not regard political consequences; how

formidable soever they might be * * *. We are to say, what we take the law to be: if we do not speak our real opinions, we prevaricate with God and our own consciences."

2. It is of the essence of the great writ that such serious charges of fraud whenever discovered be aired in open court and that injustices of a former day shall not forever be entombed behind the walls of the finality of judgments.* Thus, this Court has scrupulously enforced the mandate of the Constitution that a conviction fraudulently contrived is inconsistent with the rudimentary demands of justice. *Mooney* v. *Holohan*, 294 U. S. 103; *Pyle* v. *Kansas*, 317 U. S. 213; *Hysler* v. *Florida*, 315 U. S. 411; *Chessman* v. *Teets*, 350 U. S. 3.**

As Mr. Justice Frankfurter stated in *Hysler*, "The guides for decision are clear": where petitioner makes out allegations which charge that a conviction was fraudulently contrived, the application may not be summarily dismissed. A hearing must be granted. *Chessman* v. *Teets*, 350 U. S. 3. The requirements of the due process clause must be respected "no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the

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* Title 28, U. S. C., Section 2255, under which this petition is brought, affords to a federal prisoner the identical rights as were formerly available by writ of habeas corpus. *United States* v. *Morgan*, 346 U. S. 502.

** See also *Brown* v. *Mississippi*, 297 U. S. 278; *Ex parte Hawk*, 321 U. S. 114; *White* v. *Ragen*, 324 U. S. 760; *Hawk* v. *Olson*, 326 U. S. 271; *Shelley* v. *Kraemer*, 334 U. S. 1; *Burke* v. *Georgia*, 338 U. S. 941; *United States* v. *Hayman*, 342 U. S. 205. Cf. *Mesarosh* v. *United States*, 352 U. S. 1. The rule of *Mooney* v. *Holohan*, *supra*, applies, of course, to the knowing use of perjured testimony in a federal court as well as in a state court. See, for example, *Ryles* v. *United States*, 198 F. 2d 199 (C. A. 10); *Casebeer* v. *Hudspeth*, 121 F. 2d 914 (C. A. 10); *United States* v. *Kaplan*, 101 F. Supp. 7 (D. C. N. Y.).

Constitution." For, as Mr. Justice Harlan stated, "The proponent before the Court is not the petitioner but the Constitution of the United States." *Chessman* v. *Teets*, — U. S. —, 77 S. Ct. 1127, 1132.

If the principles underlying the writ required a reversal in *Chessman*, after the full appellate review afforded defendant on his original conviction by the highest court of the State of California (see appendix to opinion of Mr. Justice Douglas in *Chessman* v. *Teets*, *supra*, 77 S. Ct. at 1136), it is even more necessary that this petitioner be afforded a day in court on his charges. Unlike *Chessman*, the original record of this petitioner's conviction was never reviewed by the highest court to which appeal was possible. *Rosenberg* v. *United States*, *supra*, at 300. This Court will be "deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands" *Chessman* v. *Teets*, *supra*, 77 S. Ct. at 1132.

3. The rules applicable to habeas corpus proceedings, which guarantee that this instrument of judicial correction will not be deprived of meaning and power, are clear and simple, and hardly need extensive citation of authority:

(a) A district court is required to grant a hearing unless, in the words of the statute, "the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." *

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* The district court enunciated the standard it used in appraising the allegations of petitioner's motion as follows:

"In passing on these motions, therefore, the court is required to accept all of petitioner's averments as true insofar as they are not inconsistent with the record" (A. 203).

This standard does not accord with the mandate of Section 2255. The lower court significantly failed to state that findings adverse to petitioner must be conclusively established by the files and records.

(b) All allegations of the petition not conclusively refuted by the record must be accepted as true in determining its legal and factual sufficiency.

(c) Where a petition raises a factual issue outside the record, a hearing must be granted and the prisoner must be afforded an opportunity to prove his allegations.*

But the lower courts failed to give effect to these fundamental principles and ignored or refused to consider as true the new and detailed facts upon which petitioner seeks relief. The courts rejected these principles in favor of their own evaluation of the evidence presented, as if a hearing had already been held. It is almost impossible to ascertain from the opinions below that the sole issue is whether, upon the showing made, petitioner was entitled to an opportunity to prove his charges.

The Government is obviously acquainted with all the facts of petitioner's removal from Mexico. It knows whether Mexico expelled petitioner or the prosecution kidnapped him. But it has studiously avoided giving its version of what occurred in a sworn statement. Rather it has used its briefs and oral argument to improvise varying hypotheses of what transpired (A. 149, 157). We believe that the Govern-

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In every collateral attack charging knowing use of perjured testimony, the allegations based upon extrinsic evidence must be "inconsistent" with the files and records of the case. So, in the instant case, the new evidence establishing the knowing use of perjured evidence of "legal deportation" is "inconsistent with the record". For this reason, the record cannot be relied on to resolve the issue. See *Davis* v. *United States*, 210 F. 2d 118 (C. A. 8); *Michener* v. *United States*, 177 F. 2d 422 (C. A. 8); *Barrett* v. *Hunter*, 180 F. 2d 510 (C. A. 10), cert. denied 340 U. S. 897; *Sanders* v. *United States*, 205 F. 2d 399 (C. A. 5); *United States* v. *Rutkin*, 212 F. 2d 641 (C. A. 3).

* Upon the remand of this proceeding, the district court should be directed to require petitioner's presence at the hearing. Petitioner's relation to the events in Mexico and the issue posed by the lower court as to his knowledge of the circumstances of his removal, make his presence vitally necessary. See *United States* v. *Hayman*, *supra*, at 223.

ment of the United States cannot ignore our grave allegations merely because it seeks to avoid a hearing. Even lesser charges should not be disposed of with tactical evasions that would convert a proceeding of this kind into a game of hare and hounds.

The lower courts removed the Government's burden of responding by resolving all issues of fact without a hearing and adversely to petitioner. This fundamental error of the lower courts itself constitutes a denial of due process. *Brown* v. *Mississippi*, 297 U. S. 278.

4. The gravamen of the opinion of the lower court is its finding that "there was no perjury" (Appendix II, p. 7a). It decided without a hearing that "appellant was nonetheless deported and the witness [Huggins] did no more than testify to what he personally observed, or was told by appellant, and noted in the manifest in the regular course of his official duties" (Appendix II, p. 7a). The court accordingly concluded, "It is nothing short of absurd to characterize this as wilful perjury deliberately foisted on the trial court by the prosecution. There was no perjury" (Appendix II, p. 7a).

But the lower court could arrive at this conclusion only by totally ignoring petitioner's charges. By what legal process could the Court of Appeals conclude in this proceeding that "appellant was nonetheless deported"? Petitioner has charged in the greatest detail that he was not deported or in any manner expelled by the Government of Mexico; that in fact he was abducted by agents of the prosecution without the participation, knowledge or consent of the Government of Mexico. The Court of Appeals could not ignore these allegations merely because it deemed them distasteful or incredible. Compare *Chessman* v. *Teets, supra.* See *Walker* v. *Johnston*, 312 U. S. 275; *Waley* v. *Johnston*, 316 U. S. 101; *Martin* v. *United States*, 199 F. 2d 279 (C. A. 8); *Smith* v. *United States*, 223

F. 2d 750 (C. A. 5).* The truth will be ascertained in the full light of a judicial hearing and not as a result of the *ex parte* determination of an appellate court. This is the elementary command of Section 2255 and the due process clause.

In finding that Huggins "did no more than testify to what he personally observed", the Court of Appeals utterly ignored the specific charge that within a day after petitioner's arrival in Laredo, Texas, Huggins himself, as well as other employees of the Immigration Service, were personally advised by Senor Hector Rangel Obregon, the Chancellor of the Mexican Consulate at Laredo, that petitioner had not been deported (A. 27).

More than this, Huggins was explicitly informed by Senor Obregon that the abduction had taken place without the knowledge or approval of the Mexican Government (A. 27). Three agents of the Federal Bureau of Investigation were present in Laredo, Texas, when Huggins was so informed (A. 27-28), and one of these agents was present at the prosecution's table throughout the trial (A. 28).

Thus, in August, 1950, the witness Huggins, in the presence of agents of the prosecution, was told by a representative of the Government of Mexico that petitioner's seizure had occurred without the knowledge or approval of that Government. Yet, in March, 1951, seven months after being apprised of the true facts, Huggins testified in court that the individuals who handed petitioner over to him were "Mexican authorities" acting "in an official capacity" (R. 1026). And while Huggins was so testifying, the rep-

* Petitioner's charge of kidnapping by agents of the United States Government cannot be dismissed as utterly improbable in light of the many instances of abduction from foreign territory by officials and private individuals of this and other countries recorded in the annals of diplomacy. See companion petition for writ of certiorari. The temptation to evade the rigorous requirements of extradition treaties is particularly strong in the case of a neighboring country, from which an illegal removal presents few physical problems.

resentatives of the United States Government, sitting at the counsel table, vouched for his testimony, even though the Mexican Government had specifically informed them that petitioner's abduction had occurred without its knowledge or approval.

We find it difficult to understand how any tribunal could conclude on such a record that Huggins' testimony was not perjurious and that the prosecution was not fully aware of the perjury.

The entire purpose of the witness' appearance was to lay a foundation for the admission into evidence of the card containing the words "Deported from Mexico". This card could not be admitted into evidence in the absence of testimony from the subscribing Government official that the entry was made in the regular course of business. And so the witness took the stand and testified that the notation was made in the course of a regular practice involving "any person who is being deported from Mexico" (R. 1036).

In order to introduce the manifest into evidence, Huggins was required to testify that it was made in the regular course of business in respect to deported persons. Thus, in the first place, Huggins had to convey the impression *de hors* the manifest that petitioner was a deportee. On the basis of his testimony of how he handled petitioner as a deported person, the manifest was admitted. The prosecution was then able to rest on its notation "Deported from Mexico," rather than on Huggins' vulnerable testimony.*

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* This analysis of the prosecution's strategy is confirmed by its response to petitioner's contentions on the original appeal (Government's Brief to the Court of Appeals, p. 67):

> "Notwithstanding all this, appellant argues that the entry was not competent because it was made *post litam motam* and therefore was not trustworthy. This argument seems particularly strange in view of the fact that the entry was based on personal observation and the entrant appeared as a witness and was sub-

Knowing that Huggins had been informed of the truth by Senor Obregon, the prosecution was reluctant to use him as the vehicle for proving deportation. It sought to contrive the fraud through the less vulnerable instrument of the written manifest. But it was forced by the rules of evidence to use Huggins' perjured testimony as the foundation for the introduction of the manifest. Thus the notation on the manifest—false in itself—is no immunizer of perjury, as the lower courts suggest. Huggins' testimony could rise no higher than its fraudulent foundation. *Cf.* A. 219.

5. The moving papers adequately demonstrate that, whether or not Huggins' testimony was perjured, the entry "Deported from Mexico" was false. Were we to ignore Huggins' perjury, the prosecution's knowing use of this false evidence nevertheless constituted a fraud.* Hence, the lower courts' opinions directed solely to Huggins' testimony do not meet petitioner's charge. Under the prin-

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jected to searching cross-examination (1520, 1527-35). * * * Furthermore, according to the Inspector's testimony, Sobell was advised that the Immigration Service required a manifest card to be filled out in the case of every person deported from Mexico, after which he willingly furnished certain background information that went into the card, and signed it (1534, 1522, 1526). Since this testimony stands unchallenged, it is difficult to understand the basis of appellant's claim that the entry itself was untrustworthy."

* The prosecution had only one purpose in offering Government Exhibit 25. When defense counsel declared that they would not object to the admission of that side of the manifest showing petitioner's signature and the words "Brought to immigration office by Mexican police", the prosecution rejected that offer and insisted that the other side with the entry "Deported from Mexico" be likewise admitted (R. 1029).

ciples enunciated in *Mooney*, the knowing use of false evidence invalidates a conviction.*

6. On March 9, 1957, two days after the argument before the Court of Appeals, the Secretariat of *Gobernacion*, the department of the Government of Mexico exclusively responsible for the deportation or expulsion of aliens from Mexico officially certified that in its files relating to petitioner "there is no record to the effect that this department has ordered his expulsion from the country." Appendix III, p. 18a, *infra*.**

The Court of Appeals denied petitioner's motion to amend the record to include this statement by the Mexican

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* The Government's present contention, adopted by the lower court, that the entry had the limited purpose of proving forcible return is refuted by the record. In any event, it is beside the point. As Mr. Justice Black stated in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 247, "Truth needs no disguise." If the prosecution had wished to prove merely that petitioner was forcibly abducted and returned, it could have done just that.

** This document was particularly significant in view of the Government's argument in the court below. In its brief (at pp. 53-54) the Government asserted that petitioner did "not even make a prima facie showing in his petitions that responsible officials of the 'Mexican Government' were ignorant and did not approve of his ejection from Mexico." To support this contention, it distorted petitioner's evidence:

> "All Sobell can say is that one man in Mexico did not find a record at Nuevo Laredo of Sobell being 'officially deported by the Secretariat of Gobernacion through [Nuevo Laredo].' (Exh. 12 to S. Petition No. 1). The Secretariat at the home office of Gobernacion even disavows 'responsibility' that the person who reported the lack of records was an official of the Mexican Government. (Exh. 13 to S. Petition No. 1)"

This characterization is grossly misleading. As petitioner's motion exhibit 13 plainly shows, the Director General of Administration of "the home office of Gobernacion," far from disavowing "'responsibility' that the person who reported the lack of records was an official of the Mexican Government," certified that the signer of Exhibit 12 was the Chief of the Office of Migration at Nuevo Laredo.

Government, despite the universally applied rule that amendments will always be permitted in the interest of justice in habeas corpus or Section 2255 proceedings.* Inasmuch as the court thereafter held that petitioner was in fact deported (Appendix II, p. 7a), its denial of the amending motion was particularly erroneous.

The lower court's decision stands or falls upon its determination that petitioner was in fact deported. But unless petitioner's allegations, supported by the official statements of the Government of Mexico, are to be ruthlessly disregarded, this is impossible to determine without a hearing. And unless all of the principles underlying the administration of Section 2255 are to be abandoned in the case of this petitioner, the lower court's resolution of this issue without a hearing makes mandatory the reversal of its judgment.

7. While the court below avoided the necessity of granting a hearing by the simple expedient of denying petitioner's factual contentions, the district court sought to avoid the impact of the obvious fraud by rewriting *nunc pro tunc* the record of the original trial.

Thus the district court implies that the prosecution never really intended to adduce evidence concerning "legal deportation." All the prosecution was interested in showing was that "Sobell's return to this country had been involuntary" (A. 218). In summarizing the evidence offered and the summation of the prosecution, Judge Kaufman writes, "Patently, this does not show an attempt by the prosecution to create the impression of legal deportation as is now charged" (A. 218). As to the embarrassing insistence by Huggins and the prosecution on the words

* While the lower court should have accepted petitioner's amendment of the record, at a minimum it should have remanded the case to the district court to reconsider the motion in the light of the new document. See *United States* v. *Pisciotta*, 199 F. 2d 603 (C. A. 2).

"deportation" and "deported", Judge Kaufman concludes: "It is entirely clear that he was using the word 'deported' to mean expelled or ejected * * *" (A. 218).* Since Huggins did not mean "deported" when he wrote "deported", it was not perjury for him to give this testimony in the light of his clear knowledge that the Mexican Government had not deported petitioner.

It is quite apparent why the Court of Appeals found it difficult to adopt this rationale. The original Court of Appeals, consisting of the then Chief Judge Swan, Circuit Judge Chase and the late Circuit Judge Frank, unlike Judge Kaufman, did not read Huggins' testimony and the manifest as establishing that the petitioner had been "expelled or ejected" rather than "deported".

Quite to the contrary, these experienced judges concluded that the evidence offered was intended to establish "*legal deportation*". In ruling on the materiality and relevance of the evidence, they stated: "* * * the Government introduced evidence to show that Sobell had been *legally deported* * * *." (*United States* v. *Rosenberg, supra*, 195 F. 2d at 603; see also footnote 20 at page 603. Our emphasis.) In light of this finding by the original panel, the lower court could hardly adhere to Judge Kaufman's rationale.

Judge Kaufman's opinion, therefore, rests upon the proposition that the prosecution did not intend to create the impression that petitioner had in fact been deported by the Government of Mexico. But if three circuit judges inferred from the evidence that the prosecution was seeking to prove "*legal deportation*", it is manifestly untenable to argue, as Judge Kaufman must, that no members of the jury could conceivably have drawn this

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* In any event, the terms "expelled" or "ejected" would be equally false in that they plainly denote action by the Government of Mexico. See Paragraph 8, *infra*.

same inference. The twelve members of the jury undoubtedly drew the ordinary, everyday inference from the use of the words "deportation" and "deportee". To laymen and jurist alike, these words bore the inevitable connotation of official action by the Government of Mexico.*

8. Even assuming, *arguendo*, that the prosecution did not mean to imply "legal deportation," it is impossible to avoid the conclusion that it sought to paint a picture of action against petitioner by the Government of Mexico. The trial court so characterized the evidence in stating to the jury that "he [petitioner] was apprehended only after being delivered to the United States by the Mexican authorities" (R. 1559-1560).

But petitioner was *not* delivered to the United States by "the Mexican authorities". So to interpret what actually took place is again to ignore petitioner's allegations.** Participation by individual employees of a local police force in a matter unrelated to their duties and

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* This Court in *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730, stressed the connotation of governmental action of the term "deportation":

> "The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend."

** The district court also misstates petitioner's allegations when it suggests that they are based on irregularities in Mexican deportation procedures (A. 201, 217-218). The point of petitioner's charge of course is that Mexico had nothing to do with his removal.

unauthorized by the agency does not convert petitioner's seizure into an act of Mexican authority.*

If, as we allege, the individual Mexican policemen who participated in the abduction were not acting at the direction of any Mexican authority, their conduct could not, of course, be attributed to the Mexican Government. Indeed, their participation—considered together with the other circumstances we have described—confirms the view that they acted on behalf of the FBI. The Government nowhere asserts that these individuals acted on behalf of the agency of which they were members. Such a contention would, of course, frame a question of fact for resolution at a hearing.

We suggest that it was hardly proper for the same judge who charged the jury that they might consider petitioner's apprehension "only after being delivered to the United States by the Mexican authorities" in determining his guilt, to dismiss out of hand and without a hearing petitioner's allegation that this very "element of proof" was false.

9. The district court attempted to deprecate the significance of the fraud charged and maintained that if the facts alleged concerning petitioner's kidnapping had been brought out on the trial it would not have benefited him (A. 164, 220). But Judge Kaufman glossed over the legal

* The individuals who effected petitioner's removal had no "legal or rightful power", no "right to command or to act", no "power * * * in virtue of [their] office", no "jurisdiction", no "authorization", no "quasi-governmental power * * *." (*Webster's New International Dictionary of the English Language*, definitions of "authority".)

The position of the lower court on this question is contradictory. On the one hand, it contends that the activities of the FBI and of the United States Embassy in Mexico on behalf of the prosecution did not constitute acts of the United States. On the other hand, it elevates the escapade of local policemen sponsored by United States authorities to an act of Mexico.

impact of the fraud upon the prosecution's case. Without the "flight" evidence petitioner's conviction on the uncorroborated testimony of a confessed perjurer would have been highly unlikely. The "flight" evidence was therefore vital to the prosecution's case. In turn the "deportation" was, as the district court concedes, the "capstone" of this evidence (A. 218) and, as the prosecution stated, "persuasive evidence of his [petitioner's] consciousness of guilt" (Government brief on original appeal, p. 66). This evidence was utilized by the prosecution to establish that petitioner would not have returned voluntarily to the United States and thereby projected an image of guilty conspiratorial flight.

However, the prosecution could not have used this evidence to accomplish these objectives unless petitioner's removal was in some form attributed to the Government of Mexico. Had it been known that petitioner was seized by agents of the United States, this evidence of "forced return" would have been barred under *McNabb* v. *United States*, 318 U. S. 332, as contrived by the prosecution in violation of federal law.* See Rule 5 of the Federal Rules of Criminal Procedure and Title 18, U. S. C., Sections 1201, 3041, 3042, 3184. The most serious problems of personal and national jurisdiction would have been introduced into the trial.**

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* That conduct such as this would have been subject to the injunction of *McNabb* is evident from the decisions of this Court. Cf. *Rea* v. *United States*, 350 U. S. 214; *Anderson* v. *United States*, 318 U. S. 350; *Nardone* v. *United States*, 302 U. S. 379; *Mesarosh* v. *United States*, 352 U. S. 1; *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217; *Ballard* v. *United States*, 329 U. S. 187; *Klapprott* v. *United States*, 335 U. S. 601; *Offutt* v. *United States*, 348 U. S. 11; see also *Helwig* v. *United States*, 162 F. 2d 837 (C. A. 6); *United States* v. *Chapman*, 158 F. 2d 417 (C. A. 10); *Kelly* v. *United States*, 194 F. 2d 150 (App. D. C.); *Fletcher* v. *United States*, 158 F. 2d 321 (App. D. C.); *Delaney* v. *United States*, 199 F. 2d 107 (C. A. 1); compare *United States* v. *Coplon*, 185 F. 2d 629 (C. A. 2).

** See companion petition for writ of certiorari.

Moreover, disclosure of the prosecution's role would have precluded the use of evidence concerning petitioner's travels in Mexico as the fruit of illegal search and seizure.* To protect the "flight" evidence from the sanction of *McNabb*, the prosecution suppressed the facts of its abduction and substituted the fiction of Mexican deportation.

This Court has consistently rejected the proposition that it is necessary or indeed possible to evaluate the degree of prejudice resulting from the knowing use of perjured evidence.** But here the prejudice is manifest. By definition, the term "deportation" carries a pejorative connotation, which in this case imported to the jury that petitioner had been returned to the United States by the Government of Mexico as an undesirable alien considered inimical to the welfare of that country.† It imported a prior determination of petitioner's probable guilt. As Judge Kaufman acknowledged (A. 121):

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* The evidence of a trip to Vera Cruz and Tampico and of the use of aliases was obtained directly or from clues secured by the prosecution's agents in the course of their illegal search and seizure of petitioner's residence and person at the time of the unlawful arrest. (Prior to petitioner's arrest the prosecution was completely unaware of his trip to Vera Cruz and Tampico or the use of aliases.) Had petitioner been advised of the circumstances of his seizure, he could have moved for a hearing and upon such hearing had such evidence excluded. *Catalanotte* v. *United States*, 208 F. 2d 264 (C. A. 6); *Boyd* v. *United States*, 116 U. S. 616; *Weeks* v. *United States*, 232 U. S. 383; *Nardone* v. *United States*, 302 U. S. 379; *United States* v. *Caplon, supra*; cf. *Gouled* v. *United States*, 255 U. S. 298; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385.

** *Stein* v. *People of the State of New York*, 346 U. S. 156, 205; *Mooney* v. *Holohan*, *Hysler* v. *Florida*, *Pyle* v. *Kansas*, all *supra*. See also *Coggins* v. *O'Brien*, 188 F. 2d 130, 139 (C. A. 1).

† "'Deportation' is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare * * *." *Fong Yue Ting* v. *United States*, 149 U. S. 698, at 709.

"* * * indeed it would hurt you if they established that there was a legal deportation because then it would rise to the heights of having a legal adjudication."

In the light of these considerations, it can not be said that the lower courts' opinions reflect sufficient sensitivity to the demands of due process or recognition of the legal consequences of the prosecution's misconduct.

10. To safeguard the fraudulent evidence from judicial attack or inquiry the prosecution made false representations to both the trial and appellate courts that petitioner was deported.

(a) On the day of sentence, petitioner submitted an affidavit in support of a motion in arrest of judgment asserting that the district court lacked jurisdiction over his person. He requested a judicial inquiry to learn the circumstances and parties responsible for his removal from Mexico. In opposing this motion the prosecution attacked the credibility of the affidavit and insisted that petitioner was "a deportee" and that "the final act of deportation was effected at Laredo" (R. 1598-1599.)* As we have shown, the prosecution knew that these representations were false.

"In modern law, the removal, from a country, of an alien considered inimical to the public welfare or not lawfully there;—distinguished from *transportation* and *extradition*." *Webster's New International Dictionary of the English Language.*

"2. *Law.* The sending back of an undesirable or criminal alien to his own country or to the country whence he came." *Funk & Wagnalls New Standard Dictionary of the English Language* (1956).

* Seizing upon petitioner's obviously innocent error of calling his tourist card (then in the hands of the prosecution, A. 33), a "visa", Mr. Saypol sought to convey the impression that petitioner had entered Mexico illegally (R. 1598).

(b) To sustain the conviction, the prosecution represented to the Court of Appeals on the original appeal that petitioner had been deported by the Mexican authorities. It asserted that "there is not a shred of evidence that any United States agent assisted the Mexicans in this act" (Government Brief on original appeal, p. 38).* On the basis of the evidence and these representations, the Court of Appeals concluded that petitioner had been "legally deported." 195 F. 2d at 603.

We need not speculate whether knowledge of the true circumstances of petitioner's removal would have persuaded Judge Chase and Judge Swan to join in Judge Frank's dissent. This Court has held that it will not weigh the relative impact of a fraud practiced upon an appellate court in reversing the judgment. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238.** The principles

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* In Appendix V we reprint excerpts from the prosecution's brief to the Court of Appeals wherein it insisted that petitioner had been deported by the Mexican authorities.

** Mr. Justice Black, rejecting the contention that the complaining party had failed to show sufficient diligence in exposing the fraud, expressed the rationale underlying the Court's decision (at 246):

"But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. * * * Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

developed in *Hazel-Atlas*, a patent case, are even more compelling here where the administration of criminal justice is involved and the liberty of a citizen is at stake.

This Court has enunciated the standards which must govern the conduct of a prosecutor in a criminal proceeding. *Berger* v. *United States*, 295 U. S. 78, 88.* Before the lower courts, the prosecution clearly did not fulfill its obligations. Even before this Court, the Government lacked candor in failing to point out that the Court of Appeals had mistakenly concluded that petitioner was legally deported.**

These serious charges, uncontroverted by the Government, can only be resolved by granting petitioner a hearing.

11. Throughout this proceeding, the Government has sought to create the impression that petitioner's present charges are merely a "twice told tale", which was litigated in a prior proceeding. This, in turn, is based upon the contention that the present application is no more than a relabeling and recasting of the motion in arrest of judgment submitted by petitioner at the original trial. While neither of the two lower courts rests upon this proposition as a principal ground for denying relief, it is necessary to note that this contention can find no support in the record.

As we have pointed out, the motion in arrest of judgment was supported by an affidavit which raised the question of the court's jurisdiction over petitioner's person on the ground that his arrest appeared to be improper (R. 31-33; Appendix IV, *infra*). Not knowing who the authors of his seizure were and the full circumstances of his removal, petitioner requested the aid of the court to acquire this information by a judicial hearing.

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* Indeed, the prosecutor in this case referred to these standards to clothe the challenged evidence with the prestige and integrity of his office (R. 1510-1511).

** Compare motion of Solicitor General in *Mesarosh* v. *United States*, 352 U. S. 1.

The qualitative difference between the motion in arrest of judgment and the present proceeding is demonstrated not merely by the different legal grounds upon which relief is sought. More significantly, the present motion is based upon a different set of facts. A comparative reading of the affidavit and the present moving papers will establish that the present facts and legal issues have never been litigated before.*

The lower courts could only equate the present proceeding and the prior motion in arrest of judgment by disregarding all the new operative facts posed here for the first time. It is this new evidence which establishes that the prosecution had fraudulently contrived petitioner's conviction. By assimilating the present motion to the prior proceeding the lower courts avoided the burden of considering the merits of petitioner's present motion.

The issue is not whether petitioner has unsuccessfully sought on prior occasions to have his conviction set aside; the issue is whether the new operative facts here posed have been raised and litigated before.** The principles laid

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* It is ironical that the Government relies on the trial motion as a possible bar to this proceeding when the district court and the Court of Appeals held that this motion was untimely and neither ruled on the merits nor litigated the limited facts then presented. 195 F. 2d at 603. Moreover, if petitioner proves his present charges at a hearing, the prior decision on the motion in arrest of judgment must be set aside in that it lacked all validity because of the false representations of the prosecution.

** As this Court stated in *Chessman* v. *Teets*, *supra*, 77 S. Ct. at 1132:

> "Certainly this Court's previous denials of certiorari, Chessman v. People of State of California, 340 U. S. 840; 341 U. S. 929; 343 U. S. 915; 346 U. S. 916; 348 U. S. 864, do not foreclose us from now granting appropriate relief. Brown v. Allen, 344 U. S. 443. And it may be noted that it was not until the present proceedings in the district court that the facts surrounding the settlement of the state court record were fully developed."

down by this Court in habeas corpus proceedings effectively dispose of any contention, however lightly raised, that the present petition is not timely.*

Even prior unsuccessful litigation charging the knowing use of perjured testimony of the same witness does not bar a subsequent motion, unless it is conclusively established that the movant was presenting no new evidence. As Mr. Justice Murphy stated in *Price* v. *Johnston*, 334 U. S. at 290-291:

> "In the first place, however, we cannot assume that petitioner has acquired no new or additional information since the time of the trial or the first habeas corpus proceeding that might indicate fraudulent conduct on the part of the prosecuting attorneys. As Judge Denman stated in his dissenting opinion below, 161 F. 2d at pages 708, 709: 'The gravamen of the misconduct charged is not the fact that the witness changed his testimony but that the prosecuting attorney knowingly caused the witness to give the false testimony. All the accused and his attorney knew at the trial was that the single prosecuting witness changed his testimony. Obviously this in itself does not warrant a charge of fraud. That it was fraudulently done by persuasion of the prosecuting attorney could only have been learned after conviction and after the convicted man was in the penitentiary.'"

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* *Price* v. *Johnston*, 334 U. S. 266 at 289:

> "But here the three prior applications did not raise the issue now under consideration and the three prior refusals to discharge petitioner can have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition."

See, also, *Waley* v. *Johnston*, 316 U. S. 101, 105:

> "The principle of res judicata does not apply to a decision on habeas corpus refusing to discharge a prisoner, Salinger v. Loisel, 265 U. S. 224 * * *. It does not appear that on petitioner's earlier application for a writ of coram nobis the same issue was raised as that now presented. The earlier application was denied for insufficiency upon its face and without a hearing. There is thus no basis for the holding of the district court that the denial is res judicata of the present petition."

The present record clearly demonstrates that petitioner has acquired and is now presenting for the first time new and significant evidence. Moreover, a motion raising a question of personal jurisdiction cannot be equated with one premised upon a denial of due process because of the prosecution's knowing use of false and perjured evidence.

In essence, the Government's position, as adopted by the lower courts, is an attempt to apply the doctrine of laches. But, as this Court indicated in *Chessman* v. *Teets*, *supra*, 77 S. Ct. at 1132, such a concept would destroy the very purpose of the writ. See also *Price* v. *Johnston*, 334 U. S. 266, 291; *Brown* v. *Mississippi*, 297 U. S. 278; *Commonwealth of Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116; *Chessman* v. *Teets*, 350 U. S. 3.*

The lower courts also imply that petitioner at the time of trial knew, or should have known, all the facts upon which his present allegations rest. Therefore, they argue, he has shown a lack of diligence in pursuing the issue; that

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* The reason for refusing to apply the doctrine of laches to a petition in the nature of a writ of habeas corpus has been well stated by Judge Fahy in *Farnsworth* v. *United States*, 232 F. 2d 59 (App. D. C.):

> "If a defendant without good reason waits a long time before asserting his claimed right, with the consequence that many witnesses are dead, he might have difficulty maintaining his burden of proof, or a heavier burden of proof might be imposed upon him. See United States v. Morgan, 222 F. 2d at page 675. But where the fundamental constitutional right has been denied, an accused should not be precluded from relief because he cannot satisfy a court that he had good cause for any delay in seeking it. 'To permit a defense of laches to the writ would, in effect, denude it of one of its essential characteristics—the power to hurdle a time factor.' Haywood v. United States, D. C., S. D., N. Y., 127 F. Supp. 485, 488."

See, also, *United States* v. *Morgan*, 222 F. 2d 673 (C. A. 2).

he consciously withheld this "trump card."* (Appendix II, p. 9a.) But, as petitioner stated in his moving papers, he did not know that he had been kidnapped by the prosecution's agents without the knowledge or consent of Mexico, that the prosecution had been informed of Mexico's protest and that it knowingly used false evidence and perjured testimony (A. 74). This evidence was obtained several years after his conviction.**

In any event, the issue of petitioner's prior knowledge is a question of fact which could only be determined through a judicial hearing. Moreover, a conviction contrived by the prosecution's knowing use of perjured evidence cannot be immunized from collateral attack because the defendant may have known or believed the evidence to be false. To state such a proposition is to answer it.†

To hold that petitioner's motion in arrest of judgment bars relief in this proceeding would require not only a rewriting of the record, but a disregard of the beneficent purpose of the writ.

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* The Government's claim that petitioner lacked diligence is particularly unseemly in view of the fact that the prosecution used every device to suppress evidence of the fraud and proof of its misconduct. No one but the prosecution knew the nature of the fraud. Cf. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, *supra*, at 246. Petitioner's uncertainly framed oral motion in arrest of judgment, supported by an admittedly limited affidavit and upon grounds which raised obvious questions of timeliness, was hardly a trump card. See Appendix IV, *infra*.

** This is substantiated by the dates on the exhibits establishing that petitioner has not been deported or expelled by the Government of Mexico (Exhibit 12 and Appendix III, p. 18a, *infra*). Notarized statements in petitioner's possession, upon which many allegations in the motion are based, were only obtained in 1956.

† The prosecution in *Mooney* v. *Holohan*, *supra*, contended that the defendant must have known that he was not at the place charged and hence that the testimony was false. But this Court did not consider that a ground for denying Mooney a hearing.

Conclusion

The issue raised in this proceeding is whether or not petitioner will be granted an opportunity to prove in the course of a hearing his detailed factual allegations which, if true, establish that his conviction was fraudulently contrived by the prosecution. The trial court's defensive and intemperate rejection of petitioner's contentions does not put these charges to rest. Nor does the lower court's cursory treatment of the issues raised inspire the conviction that justice has been done. If this were an ordinary case, we venture to say that a hearing would have been granted long ago. It can hardly be doubted that this petitioner is forced to seek relief here because of the gravity of the charges raised by his motion and the nature of the crime for which he was convicted.

There may be those who would shrink from granting petitioner the modest relief he now seeks because it might cast a shadow upon the validity of the unalterable sentence of his co-defendants. But only by exposing these charges to the test of a judicial hearing can we resolve the substantial doubts which haunt this case. No one unaffected by a partisan interest in protecting the extreme measures of the past era against the criticism of history will understand a reluctance to give this petitioner his day in court.

Our nation cannot tolerate a conviction steeped in fraud and tainted by false and perjured evidence. In the words of Mr. Chief Justice Warren, "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. * * * The Government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with it."

To admit the possibility of injustice in the administration of our criminal law, particularly when the fate of individuals becomes entwined with larger political issues, is concededly difficult. But the corrective processes of our law, the writ of habeas corpus itself, confirm the ability

of our democratic system to redress, in the calmer atmosphere of today, the injustices engendered by the passions of an earlier period. The validity of this proud claim, the ability of our law to engage in "sturdy self-examination and self-criticism," to function as a "civilized legal mechanism," must be confirmed in this case.

An order from this Court granting the hearing required under the law and the Constitution will demonstrate to all that our country is confident enough in the strength and vitality of its institutions to do justice to all men.

The petition for writ of certiorari should be granted. The orders and judgments below should be vacated forthwith with instructions to grant a hearing on the allegations of the petition.

Respectfully submitted,

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APPENDIX I

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of May, one thousand nine hundred and fifty-seven.

Present:

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges,
HON. CLARENCE G. GALSTON,
District Judge.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX II

Opinion

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 235 and 236—October Term, 1956

(Argued March 5, 1957 Decided May 14, 1957)

Docket Nos. 24299 and 24300

[Same Title]

Before:

Medina and Waterman, *Circuit Judges*, and Galston, *District Judge*.

Appeal from an order of the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge*.

Defendant appeals from an order denying two motions, made pursuant to the provisions of 28 U. S. C. Section 2255, for hearings and for orders setting aside his conviction for espionage conspiracy. Opinion below, 142 F. Supp. 515. Affirmed.

Paul W. Williams, United States Attorney for the Southern District of New York, New York City (Robert Kirtland and Maurice N. Nessen, Assistant United States Attorneys, New York City, of Counsel), *for plaintiff-appellee*.

Appendix II

Donner, Kinoy & Perlin, New York City, and Benjamin Dreyfus, San Francisco, California (Frank J. Donner, Arthur Kinoy and Marshall Perlin, New York City, Benjamin Dreyfus, San Francisco, California, and Luis Sanchez Ponton, Mexico City, Mexico, of Counsel), *for defendant-appellant.*

Medina, *Circuit Judge*:

At the close of a trial with his co-defendants Julius and Ethel Rosenberg, appellant was sentenced to thirty years imprisonment on April 5, 1951. After numerous attempts to vacate the judgment of conviction on various grounds, including several prior applications under 28 U. S. C. Section 2255, all of which were denied and the rulings affirmed on appeal and certiorari denied by the Supreme Court, appellant made the two motions which resulted in the order appealed from. The first motion is based upon the charge that, at the trial in 1951, the prosecution "knowingly, willfully and intentionally used false and perjurious testimony and evidence, made false representations to the Court, and suppressed evidence which would have impeached and refuted testimony given against petitioner." The second motion is based upon the charge that the "United States itself, as well as its courts * * * lacked all sovereignty and power to conduct the proceedings," and that the trial court lacked jurisdiction because of alleged violations of the Constitution and laws of the United States, including "the Extradition Treaty between the United States and Mexico." The subject matter of these charges relates to the seizure of appellant in Mexico City by the Mexican Security Police, his transportation to Laredo, Texas, where the United States Immigration Inspector made a record of appellant's entry on August 18, 1950 into the United States, and his

arrest, pursuant to a warrant duly issued on August 3, 1950 in the Southern District of New York. While appellant asserts that his contentions have not been made before, the records of the District Court make it abundantly plain that, except for some elaboration in matters of detail and the articulation of what are alleged to be new legal theories, the charges are not new, but have already been rejected in one form or another. These prior proceedings and the procedural obstacles to any possible favorable action on the two new motions have been so fully set forth in the detailed discussion appearing in the well reasoned and comprehensive opinion of Judge Irving R. Kaufman that we think it not necessary to do more than note our approval of what he has written.

The charges are of such a serious and sensational character, however, and upon careful examination they turn out on the face of the record to be so utterly groundless, that we shall briefly set forth our reasons for holding that the trial judge could not have arrived at any conclusion other than to decide, as he did, that there be no hearing on either application, as "the files and records of the case conclusively show that the prisoner is entitled to no relief," 28 U. S. C. Section 2255. There was no foisting of perjurious testimony upon the court and jury by the prosecution; no false representations were made; there was no suppression of evidence; there was no violation of the Extradition Treaty between the United States and Mexico, or of any of the provisions of the Constitution and laws of the United States; and the motions were properly denied *in toto*.

I

At the trial there was evidence which definitely connected appellant with the aims and purposes and with the consummation of the ends of the espionage conspiracy.

Appendix II

United States v. *Rosenberg*, 2 Cir., 195 F. 2d 583, cert. denied, 344 U. S. 838, rehearing denied, 344 U. S. 889. This was supplemented by proof from which the jury might well have inferred that the Rosenbergs and appellant suspected that the FBI was closing in on them and that an elaborate plan was devised which envisaged escape from the law enforcement authorities of the United States by flight to Mexico and thence by way of Vera Cruz or some other seaport to Europe, with Soviet Russia as the ultimate destination. We had another phase of this same planned exodus to Mexico before us in *United States* v. *Perl*, 2 Cir., 210 F. 2d 457, in which case Perl testified in his own defense and described how he was approached on the subject.

The testimony in this case was to the effect that Rosenberg outlined a pattern of flight for David Greenglass and his wife that would take them to Mexico, then to Europe via Vera Cruz and finally to Russia. Shortly after Greenglass and Harry Gold, another member of the spy ring, were apprehended, appellant began to follow the pattern of flight outlined by Rosenberg to the Greenglasses.

Accordingly, the prosecution proved at the trial that appellant with his wife and children went to Mexico City in the spring of 1950. Had this been a vacation jaunt for a brief sojourn, with the intention of returning to the United States, there was ample opportunity for appellant's experienced and astute trial counsel to adduce evidence to prove it; but no such evidence, testimonial or documentary, was forthcoming, and appellant did not even testify in his own defense. The prosecution, on the other hand, produced a number of witnesses who made it clear that appellant went to Mexico for purposes of flight, with a quite settled determination not to return to the United States if he could avoid doing so. The relevancy and sufficiency of this evidence have already been passed upon. *United States* v. *Rosenberg, supra.*

Appendix II

The witness Manuel Giner de los Rios, who lived in the same apartment house as appellant in Mexico City, testified that he became acquainted with appellant, who told him some time in July that he was an American and was afraid that "they were looking for him so that he would have to go in the Army"; that appellant was looking for information as to how to get out of Mexico; that a few days later appellant asked for directions of how to go to Vera Cruz, which the witness gave him; that appellant was away for about 15 days, somewhere around the 20th or 22nd of July, 1950, during which period of time the witness received from appellant in the mail an envelope postmarked Vera Cruz addressed to the witness, containing a letter which the witness delivered to appellant's wife, and another postmarked Tampico, another Mexican seaport, also containing a letter for appellant's wife.

Other witnesses testified to the use by appellant of false names and an elaborate system of correspondence from appellant in Mexico, enclosing letters for delivery to members of appellant's family in the United States, with return addresses on the envelopes and the names "M. Sowell" and "M. Levitov." The effort to avoid interception and detection is perfectly plain. Indeed, in one of his prior Section 2255 applications appellant stated: "I left the family in the Mexico City apartment and travelled around Mexico to Vera Cruz and Tampico, even using false names and inquiring about passage to Europe and South America for all of us."

The proof of appellant's return to the United States by the Mexican Security Police merely supplemented the proof of appellant's consciousness of guilt by explaining his presence at the trial, which appellant appears to concede was not voluntary. As we said on the first appeal, *United States* v. *Rosenberg, supra*, at p. 602, "otherwise the jury might have inferred that he had voluntarily returned to stand trial."

Appendix II

So we turn to the specifications of alleged perjury, false representations and suppression of evidence.

Immigration Inspector Huggins testified that on August 18, 1950 about nine Mexican officials brought appellant to him in Laredo, Texas, that he filled out the manifest, which is now challenged as palpably false, noting from what he had observed and not from anything said to him by the Mexican officials, "Deported From Mexico," and further data, such as appellant's occupation of electrical engineer, that he had spent all his life in the United States "until about two months ago," his age, address, and so on, from answers given to him by appellant. On the reverse side of the manifest, under "Remarks and Endorsements" is written, "Brought to Imm. Office by Mex. Police," followed by the signatures of Inspector Huggins and appellant.

By some process of reasoning that is far from clear to us, this is supposed to be wilful perjury because appellant asserts that he was assaulted and "kidnapped" by the Mexican Security Police, as agents of or instigated by the FBI, and brought to Laredo, Texas, without any formal deportation proceedings, which we are told are elaborate and technical and always observed with meticulous care by the Mexican authorities.

But appellant was nonetheless deported and the witness did no more than testify to what he personally observed, or was told by appellant, and noted in the manifest in the regular course of his official duties. It is nothing short of absurd to characterize this as wilful perjury deliberately foisted on the trial court by the prosecution. There was no perjury.

The charge that the judgment of conviction cannot stand because the prosecutor procured it by false representations also falls of its own weight. On appellant's motion in arrest of judgment, made shortly after the conclusion of the trial, and on April 5, 1951, his counsel referred

(p. 17a)

DEPTO. DE MIGRACION.
EST. DE PROHIBICIONES.
MESA 9.
4/350.8."50"/2543.

SECRETARIA DE GOBERNACION

ASUNTO: Se informa.

SR.
LIC. JUAN MANUEL GOMEZ GUTIERREZ.
Donceles No.87-14.
C I U D A D.

10907

En respuesta a su escrito de 19 de abril anterior, manifiesto a usted que en el expediente que se llevó al señor MORTON SOBELL, de nacionalidad norteamericana, no hay constancia alguna de que este Departamento haya ordenado su expulsión del país.

Atentamente.

SUFRAGIO EFECTIVO. NO REELECCION.
México D.F., 9 de marzo de 1957.
POR AC. DEL C. JEFE DEL DEPTO.
EL INSPECTOR.

JOSE [illegible] PEREZ.

to the manifest prepared by Inspector Huggins as a "downright falsehood," and read into the record an affidavit of appellant describing the "kidnapping" in some detail, in the course of which appellant stated that he tried to show the Mexican police his "papers, visas etc.," concluding with the charge that the United States had secured jurisdiction over appellant "by a criminal, illegal, act, and so the United States must send Sobell back to the place where they took him from, to deal with him accordingly some time in the future." This motion was denied and the order affirmed and certiorari denied, and this forms part of the background described in the opinion of Judge Irving R. Kaufman, 142 F. Supp. 515.

The alleged false statements were made by the prosecutor who spoke briefly, after counsel for appellant had fully stated the grounds for his motion in arrest of judgment. The first of these is:

> This very affidavit (of Sobell) contains a falsehood in the statement that there was exhibited amongst other things to the Mexican authorities visas. Counsel ought to know that his client never went into Mexico with a visa.

This is supposed to be false because, although appellant concededly had no visa, he did have a tourist card, which counsel now insists is a "tourist card (visa)." Thus the charge collapses. The statement as made was in all respects true. The balance of the claim of wilful deception of the court has in effect already been disposed of. The prosecutor said:

> The whole affidavit (of Sobell) portrays certainly that this defendant was not honorably escorted from Mexico but that literally he was kicked out as a deportee.

Appendix II

As the trial judge had the affidavit before him, it is difficult to see how any characterization of its contents could possibly justify a charge of wilful misrepresentation and deception; but in fact the statement was accurate. Appellant was deported from Mexico; he did not return to the United States voluntarily; and the expression "kicked out," while perhaps offensive to a refined ear, describes precisely what happened to him on August 18, 1950.

The alleged suppression of evidence is more of the same thing, with some elaboration. Appellant's international vaccination certificate is mentioned but appellant knew of its existence, made no reference to it at the trial, and he must have realized that it would cut both ways if offered in evidence. He might well have claimed that its possession demonstrated an intention to return to the United States, but the prosecution would just as likely have argued to the contrary. None of the remaining so-called "facts of abduction" tended in the slightest degree to demonstrate that appellant would have returned to the United States of his own volition. Nor are we able to discern any suppression of any evidence by the prosecution.

The nub of the matter is that what appellant now asserts he asserted in substance and in the most unequivocal way in his motion in arrest of judgment. It was then clear that what he then knew was available for his defense at the trial but, as stated by Judge Frank in his opinion on the first appeal (195 F. 2d at p. 603): "He preferred to take his chances on the verdict, withholding his trump card until the trial was over. The Federal Rules of Criminal Procedure allow no such tactic." We may add that the "trump card" would probably have proved more harmful than beneficial to appellant's defense. At least it is fair to assume that such was the conclusion arrived at by his trial counsel. They decided not to pursue the subject at the trial, further than upon the cross-examination of Inspector Huggins.

who testified that he was expecting appellant at Laredo, Texas, and "we had a lookout on him to prevent his departure from the United States." When this testimony was thus elicited, counsel for appellant stated, "that is just exactly what I wanted to get at," but the subject was not pursued further after Inspector Huggins left the witness stand.

The cases relied upon by appellant, such as *Hysler* v. *Florida*, 315 U. S. 411, *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, and *Mesarosh* v. *United States*, 352 U. S. 1, and others, where the court found perjured testimony had been used or there was improper conduct on the part of prosecuting officers, involve facts which bear not even a remote resemblance to the factual background of this case; the principles stated in those cases have no application here.

II

Appellant's supplementary motion also rests upon the charge that he was forcibly abducted from Mexico by the Mexican Security Police as agents of the United States. He contends that the alleged abduction was a violation of the Extradition Treaty between the United States and Mexico, 31 Stat. 1818, and that as a result the United States lacked power to proceed against him. He relies upon *Cook* v. *United States*, 288 U. S. 102, which holds that the United States courts may not acquire jurisdiction by means of a treaty violation. As appellant says, his "objection to national and, consequently, judicial power does not rest on the kidnapping or abduction of appellant as such, but rather upon the violation of the treaty." We must inquire, therefore, whether there has been a violation of the treaty with Mexico.

It seems too plain for reasonable debate that *Ker* v. *Illinois*, 119 U. S. 436, answers that question in the negative, even if appellant's factual assertions be taken as true.

That case involved a treaty with Peru, 18 Stat. 719, in all pertinent respects the same as the one before us, i.e., each treaty provides for extradition for certain named crimes and neither the treaty with Peru nor the treaty with Mexico in terms prohibits abduction by one party of criminals found in the territory of the other. Ker, who had been charged with a crime committed in the United States, had left the country and was located in Peru. The President of the United States issued a warrant and sent a messenger to Peru to receive Ker from the Peruvian authorities in compliance with the treaty. Instead, the messenger kidnapped Ker and returned him forcibly to the United States. Ker excepted to the jurisdiction of the court but was convicted. Upon Supreme Court review of affirmance of his conviction by the Illinois court, Ker urged two other grounds for reversal,

> But the main proposition insisted on by counsel for plaintiff in error in this court is, that by virtue of the treaty of extradition with Peru the defendant acquired by his residence in that country a right of asylum, a right to be free from molestation for the crime committed in Illinois, a positive right in him that he should only be forcibly removed from Peru to the State of Illinois in accordance with the provisions of the treaty, and that this right is one which he can assert in the courts of the United States in all cases, whether the removal took place under proceedings sanctioned by the treaty, or under proceedings which were in total disregard of that treaty, amounting to an unlawful and unauthorized kidnapping. [119 U. S. at p. 441.]

Although the language appellant uses is slightly different, there can be no doubt that he is asserting precisely the same claim as did Ker, which claim was rejected by the Supreme Court.

Appendix II

And the *Ker* case continues to have validity. It was cited in the *Cook* case, relied upon by appellant, and in *Frisbie* v. *Collins*, 342 U. S. 519, where the Court said at p. 522:

> This Court has never departed from the rule announced in *Ker* v. *Illinois*, 119 U. S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction."

Appellant seeks to avoid the impact of the *Ker* case by insisting that, although there was no treaty violation in that case, there was such a violation in the case at bar. "Unlike the facts in *Ker*", appellant says, "the petition here charges action by the United States Government * * *." Appellant relies on "The actions of the United States' agents in initiating, planning and participating in the seizure." But it can hardly be maintained, still assuming the truth of appellant's charges, that the unlawful and unauthorized acts of the Mexican police acting in behalf of subordinate agents of the executive branch of the United States Government were any more acts of the United States than the unlawful and unauthorized acts of the emissary of the Chief Executive. We think the question presented is indistinguishable from that before the Supreme Court in *Ker*, and that our decision here is controlled by that case.

Affirmed.

APPENDIX III

Motion to Amend Record

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

Comes now the appellant, upon the affidavit of Marshall Perlin, duly verified, the tenth day of April, 1957, and respectfully moves the Court that the appeal record be expanded to include as a part thereof the Exhibit attached hereto, and for such other and further relief as to the Court seems necessary and proper in the premises.

Dated: New York, N. Y., April 10, 1957.

Yours, etc.,

DONNER, KINOY & PERLIN,
342 Madison Avenue,
New York, N. Y.,

by Marshall Perlin,
MARSHALL PERLIN.

BENJAMIN DREYFUS,
57 Post Street,
San Francisco, California.

LUIS SANCHEZ PONTON,
University of Mexico,
Mexico City, Mexico,

Attorneys for Defendant-Appellant.

To:

HON. PAUL W. WILLIAMS, Esq.,
United States Attorney,
United States Courthouse,
New York, New York.

Appendix III

Affidavit of Marshall Perlin, Read in Support of Motion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARSHALL PERLIN, being duly sworn, deposes and says: He is one of the attorneys for the appellant herein and submits this affidavit in support of the motion to incorporate a letter from the Secretariat of Gobernacion of the Government of Mexico (attached hereto, made a part hereof, and marked Exhibit A), into the record on appeal.

The appeal was argued before this Court on March 5, 1957. The attached Exhibit was forwarded by Dr. Luis Sanchez Ponton some time after his return to Mexico City and was received by deponent last week. This Exhibit, dated March 9, 1957 and mailed by the Secretariat of Gobernacion on March 14, 1957, states in part:

> "that in the files pertaining to Morton Sobell, United States citizen, there is no record to the effect that this department has ordered his expulsion from the country."

Facts and documentary evidence in the moving papers establish that appellant was not legally deported or otherwise expelled by the Government of Mexico or any of its authorities; his abduction could not in any manner be attributed to the Government of Mexico or be considered an act of its authorities. (See A 24-25-26, 69, and exhibits referred therein.)

Appellant's allegations heretofore made are sufficient, and they have not been controverted by the Government in its answering papers. Nevertheless, appellant considers it appropriate, in view of certain statements made by the United States Attorney in his brief to this Court and upon

oral argument, to bring this official statement to the attention of the Court. In the course of oral argument before this Court Mr. Williams stated, in response to a question by Judge Medina, that appellant had been legally deported by Mexico.* The attached document answers this contention.

As set forth in the petition and appendices in support thereof, the Migration Department of the Secretariat of Gobernacion has exclusive authority on all matters relating to the removal of aliens from that country even when the action is instituted by the Chief Executive. Any removal by the authorities of the Government of Mexico must be authorized by and reflected in the files of that Secretariat and Department. (Appendix A to the petition, Article 92; Appendix B to the petition, Articles 1, 3, 28, 32 and 74.) The attached Exhibit demonstrates that appellant was neither deported nor in any fashion expelled by that country.

In light of appellee's arguments, in fairness to appellant and as an aid to this Court it is respectfully requested that the aforesaid exhibit be incorporated into the appeal record.

MARSHALL PERLIN.

(Sworn to April 10, 1957.)

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* The Government in its answering brief had contended our proof merely indicated that an immigration official of Nuevo Laredo was unaware of appellant's deportation. The Government stated, at page 53 of its brief:

> "Sobell does not even make a prima facie showing in his petitions that responsible officials of the 'Mexican Government' were ignorant and did not approve of his ejection from Mexico. Indeed, the inference from 'facts' which Sobell can truly report—for examples, his trip to Police Headquarters and the ease with which he crossed the Mexican border—is to the contrary. All Sobell can say is that one man in Mexico did not find a record at Nuevo Laredo of Sobell being 'officially deported by the Secretariat of Gobernacion through [Nuevo Laredo].' (Exh. 12 to S. Petition No. 1.) The Secretariat at the home office of Gobernacion even disavows 'responsibility' that the person who reported the lack of records was an official of the Mexican Government. (Exh. 13 to S. Petition No. 1.)"

Appendix III

Exhibit

OFFSET

(See opposite ☞)

SR.
LIC. JUAN MANUEL GOMEZ GUTIERREZ.
Donceles No.87-14.
C I U D A D.

10907

En respuesta a su escrito de 19 de abril anterior, manifiesto a usted que en el expediente que se llevó al señor MORTON SOBELL, de nacionalidad norteamericana, no hay constancia alguna de que este Departamento haya ordenado su expulsión del país.

Atentamente.

SUFRAGIO EFECTIVO. NO REELECCION.
México D.F., 9 de marzo de 1957.
POR AC. DEL C. JEFE DEL DEPTO.
EL INSPECTOR.

JOSE [illegible] TERE[illegible].

DESPACHADO
MAR 14 1957

c.c.p-Control.-Edif.

RBM/dhe-s-n-c-exp.

Appendix III

Translation of Exhibit

DEPARTMENT OF THE INTERIOR

Department of Migration

Promotion Division

Desk 9

4/350.8. "50"/2543.

RE: *Information*

To:

JUAN MANUEL GOMEZ GUTIERREZ, Attorney
Donceles No. 87-14
City.

10907

In reply to your letter of April 19 ult., I wish to advise you that in the files pertaining to MORTON SOBELL, United States Citizen, there is no record to the effect that this Department has ordered his expulsion from the country.

Yours very truly,

TRUE SUFFRAGE. NO REELECTION.
Mexico, D. F., March 9, 1957
By consent of the Head of the Dept.
Inspector
(signature illegible)
JOSE INEZ PEREZ

Mailed March 14, 1957

cc: Control, Building
AHM/dhe-s-n-c-ecp.

Appendix III

Affidavit of Paul W. Williams, Read in Opposition to Motion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

PAUL W. WILLIAMS, being duly sworn, deposes and says:

1. I am the United States Attorney for the Southern District of New York and represent the Government in this case. This affidavit is submitted in opposition to the appellant's motion to "incorporate * * * into the record on appeal" a letter supposedly written by the Mexican Department of Migration. The letter tendered by appellant purports to establish that Sobell was not ordered deported by the Department of Migration. That is irrelevant; the Government has never contended that Sobell was ordered deported by that Department. The Government's evidence at the trial established that Sobell was in fact deported by the Mexican Secret Police.

2. The letter now tendered by appellant might be relevant if the issue on this appeal turned upon whether the Secret Police or the Department of Migration as a matter of internal organization of the Mexican Government, should have accomplished Sobell's deportation. That intra-governmental question, however, is not before this Court.

Appendix III

Here the question is the authority of the United States to try one of its citizens for the crime of espionage, and the fairness of the trial in which a jury of twelve men found beyond a reasonable doubt that Sobell had in fact committed that crime.

3. The grounds of the Government's opposition are: 1) the letter is irrelevant, 2) it is not newly discovered, 3) on this review of a decision of the District Court documents not before that Court may not properly be added to the record here.

4. Irrelevance.—Appellant contends that Sobell was not deported from Mexico. Appellant contends that deportation must be accomplished by the Department of Migration. Appellant further contends that before deportation can be effected the administrative procedures of that department, must be followed with a right in the prospective deportee to judicial review. (Appellant's Briefs #24299 p. 13, and #249300 p. 10.)

5. That the Executive of Mexico has a right to deport aliens immediately and without prior court proceedings is apparent from Article 33 of the Mexican Constitution contained in Appendix A to Appellant's motion of May 8, 1956, which reads as follows:

> "Article 33.—Aliens are those who do not possess the qualifications provided in Article 30. They have the right to the guarantees granted by Chapter I, Title One, of this constitution; but the Executive of the nation shall have the exclusive authority to make any alien whose permanence he may deem inconvenient abandon the national territory, immediately and without prior court proceedings

Appendix III

Aliens may not mix in the political matters of the country in any manner."

6. *Not newly discovered.* If appellant had desired to place before the District Court documents such as the one he now tenders, there is no legitimate reason why he could not have done so. The tendered letter states simply that there is no record that the Department of Migration ordered Sobell's expulsion. That counsel for Sobell had access before making the instant § 2255 motions in the District Court, to other papers purporting to establish the same thing is indicated by a book entitled "The Judgment of Julius and Ethel Rosenberg", written by one John Wexley who acknowledged the assistance of counsel for the appellant, Howard Meyer and Benjamin Dreyfus (Cameron and Kahn, 1955). See Appendix 18 to that book which purports to be a telegram from the Laredo Office of the Mexican Department of Migration to the Chief of the Office of Migration, dated August 19, 1950, and reads as follows:

> NUMBER 1920. MEXICAN CONSULATE, LAREDO, TEXAS, INFORMS ME ON DEPORTATION FROM MEXICO TO UNITED STATES OF AMERICA OF THE NORTH AMERICAN, MORTON SOBELL, WHICH TOOK PLACE 3:45 A.M. YESTERDAY BY SECRET SERVICE AGENTS OF THE CAPITOL WHO EVADED THE VIGILANCE OF THE MIGRATION SERVICE. I PASS ON FOR YOUR FULLEST INFORMATION.

The fact that the appellant has now obtained a letter which contains only some of this information (that the Migration Service did not deport Sobell) and omits the rest (that the Secret Service did) hardly qualifies the evidence as newly discovered.

Appendix III

7. Impropriety of Adding Documents Not Before the District Court. Appellant contends that the District Court erred in its ruling. Appellant's burden on this appeal therefore must be carried on the basis of the record before the District Court. Documents not before that Court can obviously have no bearing upon the propriety of that Court's decision. The Government respectfully submits that the tendered letter may not properly be added to the record on appeal.

PAUL W. WILLIAMS,
United States Attorney.

(Sworn to April 15, 1957.)

Appendix III.

Reply Affidavit of Marshall Perlin, Read in Support of Motion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARSHALL PERLIN, being duly sworn, deposes and says that he submits this affidavit in reply to the answering affidavit of Paul W. Williams, Esq. and in support of the motion to incorporate a certain document into the record on appeal.

The appellee misconceives the purpose of tendering the aforesaid exhibit. As stated heretofore, it is offered to establish that the statements made by appellee in its brief and in its oral argument that appellant had been legally deported by the Government of Mexico was erroneous.

If the executive agency of the Government of Mexico which is responsible for the supervision and removal of all aliens under any and all circumstances is prepared to certify that its files are devoid of any records of deportation or expulsion, that certification is probative of the fact that appellant was not expelled and that the Mexican authorities had nothing to do with his removal.

In its brief on appeal from the original judgment of conviction, the prosecution had argued to this Court that the evidence presently challenged established that appellant had been legally deported. The exhibit which deponent seeks to incorporate into the record on appeal establishes that this contention was false.

Appendix III

The Government's answering affidavit represents the first occasion in the instant proceeding where the appellee has attributed the removal of appellant to the Chief Executive of Mexico, purportedly pursuant to Article 33 of the Mexican Constitution. The appellee thereby purports to establish that the Secret Police of Mexico City were acting pursuant to the direction of the Chief Executive of that nation. In addition to ignoring the fact that a removal pursuant to Article 33 would be reflected in the files of the Secretariat of Gobernacion and that such action must be countersigned by the head of that department, it suggests an illegal act on the part of the Chief Executive. Of course, there is no evidence to sustain appellee's contention.

This belated claim is in direct conflict with the factually supported allegations contained in appellant's moving papers. It is unsupported by any evidence in the files and records of this case.

The determination of this pertinent issue of fact cannot be resolved by exchanges of affidavits. It must be resolved by granting appellant a hearing. The answering affidavit of appellee establishes the relevancy of the document and makes necessary the reversal of the decision of the court below.

WHEREFORE, deponent respectfully requests that the relief sought in the motion be granted.

MARSHALL PERLIN.

(Sworn to April 18, 1957.)

Appendix III

Order Denying Motion

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of April, one thousand nine hundred and fifty-seven.

Present:

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges,

HON. CLARENCE G. GALSTON,
District Judge.

[SAME TITLE]

A motion having been made herein by counsel for the appellant to amend the record on appeal,

Upon consideration thereof, it is

ORDERED that said motion be and it hereby is denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX IV

Affidavit of Sobell in Arrest of Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MORTON SOBELL, being duly sworn, deposes and says:

I am one of the defendants herein and I make this affidavit in the interest of justice and in furtherance of my rights as an American born and brought up in this country.

On Wednesday, August 16, 1950 at about 8:00 P. M. we had just finished our dinner in our apartment in Mexico City in the United States of Mexico, and while my wife and I were lingering over our coffee there was a knock on the door. My older daughter opened the door and three men burst into the room with drawn guns and bodies poised for shooting; these men did not ask my name, did not say what they wanted. I demanded to see a warrant, or some other legal process. No reply, except some vague charge that I was one "Johnny Jones" and that I robbed a bank in Acapuco in the sum of $15,000.00 was made. Of course, I vehemently denied the charge and tried to show them my papers, visas, etc., to prove that I was no bank robber.

One of the men showed a piece of metal in his hand and said they were police. They were dressed in civilian clothes. A fourth man came later. He also was in civilian clothes.

Appendix IV

Only about 10 minutes lapsed from the time that they came till they hustled me out, and that was after I insisted on calling the American Embassy; but without being permitted to do so.

They picked me up bodily and carried me down from the fourth floor to the ground floor. In the street I kept shouting for the police. A taxi was hailed and they opened the door; tried to force me into the taxi; when two more men came in and beat me over the head with black jacks until I lost consciousness. I woke up in the taxi and I was stretched horizontally at the feet of the three men.

When the car stopped in front of a building, they ordered me to get up; they told me to get into the building, but not to make a scene or they would plug me. We walked to the elevator; we went upstairs, and, we went into an office. They sat me down and a slim, tall, dark man came over; he looked at me. I asked him what it was all about: He slapped me in the face and told me that *they* were the ones that were *asking* questions. At that point I discovered that my head was bloody and my shirt bespattered with blood.

However, they asked me no questions, but they photographed me in several poses. We spent in that building from approximately 8:30 P. M. till 4:00 A. M. At 12:00 midnight, they offered me something to eat; but I had no appetite for food. During all the time no one questioned me. Some persons who identified themselves as officers to guard me chatted with me but expressed ignorance of the reason I was there.

At 4:00 A. M. I was moved into a large four door Packard and seated in the rear with two armed men, one on each side of me. At that moment, the same tall thin man came to the door and spoke to my guards in *English* saying to them "if he makes any trouble, shoot him."

Appendix IV

The driver of the car, who apparently was the leader of the expedition, and who answered to the name of "Julio" told me that they were taking me to the Chief of the Mexican police for further action. With a number of stops for one reason or another, we drove on till about 6:00 P. M. At that time Julio tried to make a phone call, or he did make one, and he told me that he was trying to get the Chief of Police. The same thing happened at about 10:00 P. M., and at midnight, on August 17th, telling me that he was trying to make sure that the Chief of Police would be available.

At about 1:30 we arrived at Nueva Lorado, we stopped in front of a building, and Julio went into the building and returned in about ten minutes and told me that he had spoken to the Chief and that the Chief told him to take me across the border and let me go.

We stopped at the Mexican customs on the Mexican side of the bridge, across the Rio Grande marking the border. No examination was made of my baggage and then we waited around in the car for about ten minutes. Julio returned and we started onward. When we reached the bridge, which as heretofore stated marks the boundary between the U. S. A. and Mexico, our car was flagged. We stopped and the front door opened. A man entered with a badge in his hand and stated that he was a United States agent and he remained in the car. When we arrived at the United States Customs I was directed to sign a card after they searched my baggage and myself. They handcuffed me and placed me in jail where I remained for five days, after which time I was taken to New York City.

MORTON SOBELL.

(Sworn to before me this [illegible] day of April, 1951.)

APPENDIX V

Excerpts from Prosecution's Brief on the Original Appeal to the Court of Appeals

Page 34:

Sobell claims that this testimony and his affidavit were enough to require the trial court to hold a hearing to determine whether his arrest in Mexico and subsequent transportation to Texas were "acts done or participated in by officers of the United States," and that the court's refusal to do so was error. Sobell's Brief, p. 63. We maintain, *first*, that Sobell forfeited any right to question the court's jurisdiction of his person by going to trial on the merits without objection; *second*, that Mexico had every right to expel Sobell without ceremony, and that even if United States agents requested such expulsion (of which there is no proof), it would not render it unlawful; and *finally*, that even assuming that Sobell was brought before the court below by unlawful means, the court did not lose jurisdiction.

Pages 38-39:

B. *Mexico had a right summarily to expel Sobell, and even if it be assumed,* arguendo, *that the United States requested his expulsion, such request did not render the action unlawful.*

Putting to one side the question of waiver, and turning to the merits of Sobell's motion, we find the evidence undisputed that his expulsion from Mexico was the act of the Mexican police (1525-26; 2410-14).* There is not a shred of evidence that any United States agent assisted the Mexicans in this act. Nor is there anything in the record to indicate that the United States Government procured

* Under this and the next subheading we assume, *arguendo*, the truth of the allegations contained in Sobell's affidavit.

the Mexican Government to deport Sobell. The most that appears is that the F. B. I. was waiting for Sobell in Laredo when he was delivered by Mexico into the hands of the United States Immigration Service. From this it may be inferred that the Mexican authorities had alerted the F. B. I. to expect Sobell's arrival, but it by no means follows that the Bureau was the instigator of Sobell's ouster.

That Mexico had a perfect right to expel Sobell, an alien fugitive from justice, is settled beyond permissible dispute:

> "It will not be for a moment contended that the government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. * * *
>
> "Nor can it be doubted that the government of Peru could of its own accord, without any demand from the United States, have surrendered Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominion of Peru." *Ker* v. *Illinois*, 119 U. S. 436, 442 (1886). See also *Chandler* v. *United States*, 171 F. 2nd 921, 935 (1st Cir. 1948), cert. denied, 336 U. S. 918 (1949).

Mexico, of course, could exercise that right in any manner it desired, and we are referred to no provision of Mexican law which interdicts the summary procedure that was followed (as we are assuming) in the case of Sobell. While kidnapping may be a criminal offense in Mexico, summary deportation of a fugitive from justice is hardly tantamount to kidnapping.* Since Mexico acted lawfully in effecting Sobell's expulsion, even if we were to make the unproved assumption that the United States requested Mexico to sur-

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* Even if it is true, as Sobell alleges, that he was beaten by the Mexican police, such mistreatment would hardly invalidate his deportation.

render Sobell, it would not render Mexico's action any the less lawful. At worst, the United States would then be in a position of having counseled the commission of a lawful act. Surely a fugitive from justice who is willingly surrendered by the country of his asylum to the country where he is wanted derives no immunity from prosecution by reason of the latter's request for his surrender. Cf. *Ker v. Illinois, supra; Chandler v. United States, supra.*

C. *In any event, the jurisdiction of a federal court in a criminal case is not impaired by the manner in which the accused is brought before it.*

We sought to demonstrate above that there was nothing unlawful about the manner in which Mexico rid herself and the United States acquired custody, of Sobell. Here we shall show that even if Sobell was uprooted from his asylum and surrendered to the United States by unlawful means, the court below still had power to try him.

Page 41:

In the last analysis, however, we do not think that this Court need pass on the question of law which the Supreme Court has left open. For even if the rule were as Sobell would like it, he would not be in a position to invoke it, since it presupposes wrongful conduct on the part of a federal officer and there is not a scintilla of evidence of any such conduct here.